

1 Jaffe, Raitt, Heuer & Weiss, P.C.  
2 Scott R. Torpey Cal. SB#153763  
3 storpey@jaffelaw.com  
4 27777 Franklin Road, Suite 2500  
5 Southfield, MI 48034  
6 Telephone: 248.351.3000  
7 Fax: 248.351.3082

8 And

9 WORTHE, HANSON & WORTHE  
10 Jeffrey A. Worthe Cal. SB#080856  
11 jworthe@whwlawcorp.com  
12 1851 E First St., Ste. 900  
13 Santa Ana, California 92705  
14 Telephone: (714) 285-9600  
15 Fax: 714-285-9700

16 Attorneys for Defendant United Air Lines, Inc.

11 UNITED STATES DISTRICT COURT  
12 NORTHERN DISTRICT OF CALIFORNIA  
13

14 ALL NIPPON AIRWAYS COMPANY,  
15 LTD.,

16 Plaintiff/Counter Defendant,

17 vs.

18 UNITED AIR LINES, INC.,

19 Defendant/Counter-Plaintiff.

Case No. 07-03422 EDL

**DEFENDANT UNITED AIR LINES, INC.'S  
(UAL) REPLY TO ALL NIPPON  
AIRWAYS COMPANY, LTD.'S  
OPPOSITION TO UAL'S MOTION TO  
COMPEL DISCOVERY AND FOR  
ADDITIONAL TIME TO DEPOSE  
WITNESSES**

20 DATE: January 30, 2008

21 TIME: 2:00 p.m.

22 CTM: San Francisco

23 JUDGE: Elizabeth D. Laporte

**TABLE OF CONTENTS**

INDEX OF AUTHORITIES .....	ii
I. Introduction .....	1
II. Argument .....	1
A. Meet And Confer Requirement .....	1
B. Deposition Location .....	2
C. ANA Pilot Files .....	2
D. Operations Manual .....	6
E. Other Documents Required To Be Kept On Board .....	8
F. Cockpit Voice Recorder .....	9
G. Additional Time to Depose Pilots .....	12
III. Conclusion .....	13

**INDEX OF AUTHORITIES****Cases**

<i>Banco de Credito Indus v. Tesoriria General</i> , 990 F.2d 827 (5th Cir. 1993) .....	3
<i>Bel-Ray Co., Inc. v. Chemrite (PTY) Ltd</i> , 181 F.3d 435 (3d Cir. 1999) .....	3
<i>Buschmann v. Little Rock National Airport</i> , 222 F.R.D. 114 (N.D. Tex. 2004) .....	10
<i>Carey v. Bahama Cruise Lines</i> , 864 F.2d 201 (1st Cir. 1988) .....	3
<i>Donahay v. Palm Beach Tours &amp; Transp., Inc.</i> , 242 F.R.D. 685 (S.D. Fla. 2007) .....	9
<i>Johnson v. Kraft Foods North America, Inc.</i> , 238 F.R.D. 648 (D. Kan. 2006) .....	6
<i>McCoy v. Southwest Airlines Company, Inc.</i> , 208 F.R.D. 617 (C.D. Cal. 2002) .....	11
<i>Morin v. Nationwide Federal Credit Union</i> , 229 F.R.D. 364 (D. Conn. 2005) .....	7, 9
<i>Soto v. City of Concord</i> , 162 F.R.D. 603 (N.D. Cal. 1995) .....	6

**Statutes**

49 U.S.C. § 1154 .....	9, 10
49 U.S.C. § 1154(a)(3) .....	10

**Other Authorities**

Japan's Protection of Personal Information Act .....	3
--	---

**Rules**

Fed. R. Civ. P. 26 .....	8
Fed. R. Civ. P. 26(e)(1) .....	15
Fed. R. Civ. P. 30(d) .....	12
Fed. R. Civ. P. 30(d)(1) .....	12
Fed. R. Civ. P. 34(b)(2) .....	7, 10
Fed. R. Civ. P. 37(a)(1) .....	1, 2
Fed. R. Civ. P. 44.1 .....	3
L.R. 37 .....	2

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 Defendant/Counter-Plaintiff United Air Lines, Inc ("UAL"), by its attorneys, Jaffe, Raitt,  
2 Heuer & Weiss P.C., hereby submits the following reply to Plaintiff/Counter-Defendant All Nippon  
3 Airways Company, Ltd.'s ("ANA") Opposition to UAL's Motion to Compel Discovery and for  
4 Additional Time to Depose Witnesses:

5 **I. INTRODUCTION**

6 ANA admits in its opposition brief that it has withheld information responsive to United's  
7 document requests. It offers a laundry-list of specious objections – none of which were timely  
8 asserted in a written response – and after-the-fact justifications for refusing to provide the discovery  
9 to which United is entitled. However, the Court should not be deceived. United has requested  
10 relevant and discoverable information which ANA has no basis to continue to withhold. In fact,  
11 despite its attempts to avoid its discovery obligations, ANA appears to agree that United is entitled  
12 to the information it has requested because *ANA has asked United to produce the exact same*  
13 *information*, which United is in the process of compiling and producing. ANA cannot have it both  
14 ways, and must be compelled to produce all of the documents United has requested without delay.  
15 Further, once additional documents have been produced, ANA should be allowed to continue the  
16 depositions of ANA's flight crew, which were impeded by the English-Japanese interpretation of all  
17 questions and answers, the pilots' refusal to give straightforward answers, counsel's objections, and  
18 the fact that ANA did not produce many critical documents.

19  
20 **II. ARGUMENT**

21 **A. Meet And Confer Requirement**

22 ANA first argues that United's motion should be denied because its attorney did not meet  
23 and confer with ANA's attorney. This argument entirely ignores the Declaration of Scott Torpey  
24 ("Torpey Decl.") submitted with United's Motion to Compel, in which Mr. Torpey stated, under  
25 oath, that "pursuant to Fed. R. Civ. P. 37(a)(1), on December 21, 2007, I called ANA's counsel in  
26 an effort to secure the disclosure without court action. Additionally I previously informed ANA's  
27

1 counsel at the recent depositions of ANA's flight crew that I would be filing a motion to compel."  
2 (Torpey Decl., Document [Doc.] 45-2, ¶ 1).

3 Neither Fed. R. Civ. P. 37(a)(1) nor L.R. 37-1 require a party to confer in any particular  
4 form. As indicated in his Declaration, Mr. Torpey discussed the issues raised in the motion with  
5 ANA's counsel at the depositions, informed counsel of his intention to file a motion to compel and  
6 later attempted to contact ANA's counsel once again to discuss the issues. He was required to do no  
7 more under the rules. ANA's half-hearted argument to the contrary is not even minimally  
8 persuasive, and should be rejected by this Court.

9 **B. Deposition Location**

10 ANA's version of the events leading up to the depositions of the ANA flight crew in San  
11 Francisco bears little resemblance to reality. In fact, as discussed in Mr. Torpey's Declaration, ANA  
12 asked that the depositions be held in its counsel's Los Angeles office to accommodate the flight  
13 crew, and United noticed the depositions in Los Angeles based on that request. (Torpey Decl., Doc.  
14 45-2, ¶¶ 2-8). United made arrangements to hold the depositions in Los Angeles and incurred great  
15 expense when ANA decided to produce the witnesses in San Francisco. ANA's argument to the  
16 contrary is simply false. But the Court does not need to resolve this issue because United has not  
17 requested sanctions based upon ANA's improper conduct, though they are warranted. United  
18 merely raised the issue -- in a footnote -- to provide the Court with the proper context for ruling on  
19 the motion. ANA's effort to distort the record regarding this issue is emblematic of its conduct in  
20 discovery, which has been marked by a refusal to provide even the most obviously relevant  
21 information.<sup>1</sup>

22 **C. ANA Pilot Files**

23 It is undisputed that ANA did not produce all of the information United requested regarding  
24 the members of the flight crew. The convoluted explanation ANA offers as to why United should

25  
26 <sup>1</sup> The Court will recall one example of ANA's obstinacy -- its refusal to produce a Fed. R. Civ. P.  
27 30(b)(6) deponent regarding the Standard Ground Handling Agreement ("SGHA"). Despite the  
28 obvious relevance of the SGHA, it took a motion to compel to force ANA to produce a witness.

1 not be allowed to discover this information, which ANA has also asked United to produce, boils  
 2 down to two baseless objections. ANA first argues that it cannot fully comply with United's request  
 3 because the information is protected by Japan's Protection of Personal Information Act. ANA also  
 4 claims that the information it has withheld is irrelevant. Neither of these objections has any merit.<sup>2</sup>

5 The Federal Rules of Civil Procedure place certain obligations upon a party seeking to  
 6 invoke foreign law. Fed. R. Civ. P. 44.1 provides, in part, the following:

7 A party who intends to raise an issue about a foreign country's law must give notice  
 8 by a pleading or other writing. In determining foreign law, the court may consider  
 9 any relevant material or source, including testimony, whether or not submitted by a  
 party or admissible under the Federal Rules of Evidence.

10 Under this rule, courts possess the authority to conduct their own research in determining the  
 11 applicability of foreign law, but are not obligated to do so. *See, e.g., Carey v. Bahama Cruise Lines,*  
 12 864 F.2d 201, 205 (1st Cir. 1988); *Bel-Ray Co., Inc. v. Chemrite (PTY) Ltd.*, 181 F.3d 435, 441 (3d  
 13 Cir. 1999); *Banco de Credito Indus v. Tesoriria General*, 990 F.2d 827, 837 (5th Cir. 1993). Rather,  
 14 the party relying on foreign law bears the burden of proving its applicability. *Id.*

15 ANA has made no effort to show that Japanese law prevents the disclosure of the  
 16 information United has requested. ANA has done nothing more than cite the name of the law in its  
 17 opposition brief and attach a copy to the brief. It did not even bother to direct the Court to any  
 18 particular provision of the law. This is undoubtedly insufficient. Again, it is not the Court's  
 19 obligation to weed through the law. Rather, the obligation rests with ANA to cite the language it  
 20 relies on and show that it applies. ANA has not met its burden and, therefore, should not be  
 21 permitted to invoke the Japanese statute to unilaterally bar United from obtaining this relevant and  
 22 discoverable information.

---

23  
 24 <sup>2</sup> Throughout its opposition brief, ANA also suggests that it would have produced additional  
 25 documents responsive to United's discovery requests if a protective order had been in place.  
 26 This claim is disingenuous. United has now finalized the order, and has offered to turn over  
 27 documents with the understanding that they would be made retroactively applicable to the  
 confidentiality order. Likewise, United offered to retroactively apply the order to documents  
 produced by ANA. ANA declined this offer. Thus, ANA has demonstrated yet again that it  
 would rather quibble over procedure than move this case forward.

1 Moreover, even if the Court was to accept ANA's unsupported assertion that the law applies,  
2 the pilots themselves have agreed to produce the information. Eishin Yamaguchi testified to the  
3 following at his deposition:

4 Q. Prior to today, has anyone asked you whether you objected to producing any  
5 documentation that ANA has with regard to your employment or piloting, training,  
6 things of that nature? Has anybody asked you whether you would object to that?

7 A. No.

8 Q. Do you have a problem with us getting from ANA your records with regard to  
9 your -- nonfinancial records, but records regarding your training, employment,  
10 certifications, hours flown, any problem with us getting your aviation-related records  
11 from ANA?

12 A. That is not up to me. It is something for the company to decide.

13 Q. If the company chose to give them to us, you're fine with their decision?

14 A. Are personal information included?

15 Q. No financial information is included. Strictly regarding your aviation  
16 experience, training, hours, work history, not your personal -- for example, personal  
17 medical, personal financial information. No, none of that.

18 A. Yes.

19 (Doc. No 45-9, pp 33-34).

20 Yusuke Nishiguchi also stated that he had no problem producing the information:

21 Q. The information that's blacked out, what kind of information is that, do you  
22 know?

23 A. I do not know. And at the top it is written overall findings, and that's about  
24 me.

25 Q. Did anyone ask you whether you agreed to release that information to us?

26 A. No.

27 Q. And do you have any problem with us getting copies of those documents  
28 without all the lines blacked out?

A. Its okay with me, but there is the company, the judgment that has to be  
considered.



1 (Doc. No 45-18, p. 109)

2 Teruo Usui provided similar testimony.

3 Q. Mr. Usui, prior to the deposition, did anyone ask you if you had any objection  
4 to producing your training and personnel records?

5 A. No

6 Q. If we were to request getting your training personnel records – not financial  
7 records – but just training personnel records from ANA, do you have any problem  
8 with ANA releasing those?

8 A. Me personally.

9 Q. Yes

10 A. If the company decides to, it is okay with me.

11 (Doc. No. 45-25, pp. 25-26).

12 Based on this testimony, ANA cannot continue with the charade that Japanese law prevents  
13 it from producing the pilots' complete training and certification records.<sup>3</sup> Even if the law operates  
14 as ANA says it does -- which neither the Court nor United can determine because ANA has not cited  
15 the allegedly applicable provision -- the privilege is a personal one that the pilots can, and did,  
16 waive.<sup>4</sup> Indeed, ANA concedes that it is up to the individual, not his employer, whether to produce  
17 information covered by this purportedly applicable law, and the pilots' testimony is clear that they  
18 have agreed to produce the requested information. Moreover, any privacy concerns are alleviated by  
19 the fact that the records will be produced under the protective order United has now finalized, which  
20

21  
22 <sup>3</sup> ANA has indicated in its supplemental response to United's First Request for Production of  
23 Documents that it does not have any documents showing disciplinary actions taken against the  
24 pilots. ANA has also indicated that it does not have any additional Ground Handling Agreement  
25 documents or conflict resolution documents. Accordingly, United will withdraw its motion as to  
26 these documents, subject to ANA's continuing duty to supplement its production if additional  
27 responsive documents are located. See Fed. R. Civ. P. 26(e)(1).

28 <sup>4</sup> As ANA stated in its Response to United's First Request to Produce: "ANA further objects on  
the grounds that any documents responsive to this request would be subject to Japan's Act on the  
Protection of Personal Information and subject to a determination by the individuals to assert the  
protection of the Act, ANA's crew members may waive personal protection under the Act and  
may produce the requested documents, if any exist, at their deposition." (Doc. No. 47-9).

1 specifically covers personnel files. Accordingly, the information should be produced in un-redacted  
2 form.

3 ANA also makes the feeble argument that the information it is withholding from United is  
4 not relevant (See ANA's Opposition, p 14, "The documents contained all relevant information  
5 responsive to this request..."). It is hard to take ANA's argument seriously when it has asked for  
6 the exact same information about United's personnel, which ANA will be producing. In any case,  
7 relevance is a broad concept under the Federal Rules of Civil Procedure. See, e.g., *Soto v. City of*  
8 *Concord*, 162 F.R.D. 603, 610 (N.D. Cal. 1995) ("The scope of discovery under the Federal Rules is  
9 extremely broad. A relevant matter is 'any matter that bears on, or that reasonably could lead to  
10 other matters that could bear on, any issue that is or may be in the case'") (citation omitted); see also  
11 *Johnson v. Kraft Foods North America, Inc.*, 238 F.R.D. 648, 653 (D. Kan. 2006) ("A request for  
12 discovery should be allowed 'unless it is clear that the information sought can have no possible  
13 bearing' on the claim or defense of a party") (citation omitted). United's position in this case is that  
14 ANA's flight crew caused the accident by, among other things, failing to keep a proper lookout for  
15 United's stationary aircraft and failing to take appropriate action to avoid it. The qualifications,  
16 background and training of the ANA flight crew bear directly on the question of whether they did  
17 so. It is simply unassailable that information regarding the pilots falls within the broad scope of  
18 relevance under the Federal Rules.

19 ANA has failed to carry its burden of showing that Japanese law bars production of the  
20 training and certification information United has requested, and ANA's argument that this  
21 information is not relevant cannot be sustained in view of the broad scope of discovery under the  
22 Federal Rules and ANA's own request for this same information about United's flight crew. ANA  
23 should be compelled to produce any additional responsive information in its possession in un-  
24 redacted form.

#### 25 D. Operations Manual

26 As with the pilot information, ANA concedes that it produced only the few, hand-picked  
27 pages of its Operations Manual that it saw fit to produce. And once again, ANA wants to have it

1 both ways – it requested production of United’s entire Operations Manual even though it continues  
 2 to withhold the majority of its own Manual on relevance grounds. ANA has waived any objections  
 3 to producing this document by failing to assert them in a timely manner. Notwithstanding any  
 4 objections, this Manual is both relevant and discoverable, and should be produced in its entirety.

5 Under Fed. R. Civ. P. 34(b)(2), a party “must respond in writing within 30 days after being  
 6 served” with a request for production of documents. Where a party fails to timely respond, all  
 7 objections are waived. *See, e.g., Morin v. Nationwide Federal Credit Union*, 229 F.R.D. 364, 367-  
 8 68 (D.Conn. 2005) (“[A] party ‘is not free to raise in its brief - almost as an afterthought-entirely new  
 9 objections which it did not assert earlier.’ ... Instead, ‘a party which fails to object to a discovery  
 10 request waives any objections it otherwise might have made.’”)(citations omitted). More than 30  
 11 days have passed since United served ANA with its request for the Operations Manual, and ANA  
 12 has not served United with a written response to the request. Therefore, ANA has waived its  
 13 relevance objection, and any other objections it might have had, and must be compelled to produce  
 14 complete copies of both the Japanese and English versions of the Manual.

15 Further, even if the Court is willing to entertain the relevance objection, there is no question  
 16 that the company’s Operations Manual falls within the broad scope of relevance under the Federal  
 17 Rules. Testimony elicited at the pilots’ depositions shows the importance of this document. Mr.  
 18 Yamaguchi gave the following testimony regarding the Manual:

19 Q. Do you know what an operations manual is? Are you familiar with that term?

20 A. Yes

21 Q. What is an operations manual?

22 A. It is a manual that explains how to do our work.

23 Q. Okay. It’s an ANA document; correct?

24 A. Yes

25 Q. It sort of is the outline, if you will, of how the company and its employees are  
 26 expected to perform their duties including with regard to the operation of ANA  
 27 aircraft; correct?

1 A. Yes.

2 Q. And it's required that the manual be kept with the aircraft?

3 A. Yes.

4 (Doc. No. 45-9, pp. 34-35). Further, Teruo Usui testified that the flight crew "observed the  
5 operation[s] manual and operate [sic] the aircraft based on it" and that if he is faced with a potential  
6 conflict while taxiing, "I will act according to the operations manual" (Doc. No. 45-25, pp. 55, 58).  
7 Yusuke Nishiguchi provided similar testimony. (Doc. No. 45-18, p. 13).

8 As the testimony of ANA's flight crew indicates, the Operations Manual is a comprehensive  
9 document that governs all facets of the operation of the aircraft, and its importance is reflected by  
10 the fact that ANA requires the Manual to be kept on board the plane. For ANA to suggest that the  
11 few pages it produced contain the only information relevant to this case is preposterous. This  
12 Manual, which ANA describes in its opposition papers as a "lengthy document," would contain  
13 procedures for activating the cockpit voice recorders ("CVR"), communicating with air traffic  
14 control, ground control and ramp control, pull-back operations, taxiing, conflict resolution and a  
15 host of other issues directly related to the case. Given its significance, it cannot seriously be  
16 disputed that ANA's entire Operations Manual is relevant under Fed. R. Civ. P. 26(b)(1), as ANA  
17 concedes by its own request for United's entire Manual.

18 ANA did not timely object to producing the Manual, and its relevance cannot be disputed.  
19 ANA thus has no continuing basis to withhold this information. United is entitled to a complete  
20 copy of the Operations Manual, both the Japanese and English versions, not just the select pages  
21 produced by ANA.

22 **E. Other Documents Required To Be Kept On Board**

23 The argument ANA makes to try to justify its failure to produce documents required to be on  
24 board the aircraft provides an excellent example of its unwillingness to cooperate in discovery.  
25 ANA does not claim that there are no additional documents or that they are irrelevant because  
26 clearly neither would be true. Rather, it advances an even more futile argument – that United did  
27

1 not, in fact, submit a request to ANA for these documents. By raising this argument, ANA confirms  
2 that it has no defense for refusing to provide these materials.

3 ANA claims that the request for these documents was directed to the pilots only, not ANA,  
4 and that the pilots did not have any in their possession. Therefore, the argument goes, ANA had no  
5 obligation, and has no obligation, to produce the documents required to be kept on board the aircraft.  
6 The hyper-technical distinction ANA attempts to draw is unsupportable and demonstrates that ANA  
7 is interested only in impeding the discovery process, not moving it along towards a resolution of the  
8 case. *See, e.g., Donahay v Palm Beach Tours & Transp., Inc.*, 242 F.R.D. 685 (S.D.Fla. 2007) (“As  
9 Plaintiff aptly observes, the Federal Rules of Civil Procedure and the Local Rules of this Court  
10 require a good faith approach to discovery, not hyper-technical word games.”). United’s requests  
11 for these documents were served with the deposition notices for the flight crew. These notices were  
12 served upon ANA’s attorney, not the pilots individually, and counsel accepted them without protest.  
13 United deposed the pilots in their capacities as employees of ANA, a party to this case, not as  
14 individuals. Therefore, it was ANA’s obligation, not that of the pilots, to produce the documents.  
15 ANA has neither produced all responsive documents nor served United with a written objection  
16 under Fed. R. Civ. P. 34. Accordingly, ANA should be compelled to produce these materials.

#### 17 **F. Cockpit Voice Recorder**

18 In its effort to persuade the Court that United should not be permitted to obtain a copy of  
19 ANA’s CVR recording, ANA misstates both the law and the facts. ANA attempts to invoke 49  
20 U.S.C. § 1154 as a basis for barring United from this discovery. The Court should not even address  
21 this issue because ANA waived this objection. However, even if the Court were to overlook ANA’s  
22 waiver, nothing in § 1154 prevents United from obtaining a copy of the CVR recording. To the  
23 contrary, the statute and case law fully support United’s request for production of this important  
24 piece of information, as explained at length in United’s Memorandum of Points and Authorities in  
25 support of its motion to compel. (*See* Doc. No. 45, pp. 10-14)

26 As noted above, objections not raised in a timely manner are waived. *Morin, supra*, 229  
27 F.R.D. 364, 367-68. In its response to United’s request for a copy of the CVR recording, ANA cited



1 only its boiler-plate "general objections," and agreed to make a copy available for inspection and  
2 recording, never mentioning the statute on which it now relies. (See Doc. No. 45-7). ANA first  
3 raised the objection in its supplemental response, which was served well outside of the 30-day time  
4 limit of Fed. R. Civ. P. 34(b)(2). Based on this untimely response, ANA has waived the objection.  
5 In response to United's waiver argument, ANA offers the nonsensical statement that its "second  
6 objection was the natural and legal consequence of ANA's first objection" (ANA Opposition Brief,  
7 p. 15). United has no idea what this means. But, reading between the lines, it is evident that ANA  
8 has no defense to United's waiver argument. ANA should be compelled to produce a complete copy  
9 of ANA's CVR recording(s) without reference to § 1154.

10 As to the merits of ANA's claim, there are none. Under the statute, a CVR recording may be  
11 produced following an *in camera* review if "(A) the parts of the transcript made available to the  
12 public... and to the party through discovery... do not provide the party with sufficient information for  
13 the party to receive a fair trial; and (B) discovery of the cockpit or surface vehicle recorder recording  
14 is necessary to provide the party with sufficient information for the party to receive a fair trial." 49  
15 U.S.C. § 1154(a)(3). United has met this standard, as explained at length in its Memorandum of  
16 Points and Authorities.

17 ANA suggests that the purpose behind the statute militates against disclosure. However, this  
18 is demonstrably false, as the authorities cited in United's Memorandum of Points and Authorities  
19 show. The primary purpose of the statute is to prevent litigants from interfering with an ongoing  
20 NTSB investigation. The NTSB has completed its investigation of this incident. Therefore, the  
21 purpose behind § 1154 would not be undermined by production of the ANA CVR recording. *See*  
22 *Buschmann v. Little Rock National Airport*, 222 F.R.D. 114, 117 (N.D. Tex. 2004) ("The primary  
23 motivation behind the enactment of section 1154 was to prevent private litigants from interfering  
24 with an ongoing NTSB investigation. Because the NTSB has concluded its investigation of the  
25 crash and issued a final report, that concern is no longer an issue."). Further, contrary to ANA's  
26 assertions, United cannot obtain a fair trial without the CVR recording. No transcript of the cockpit  
27 conversations has been created in this case. All United has are the pilots' self-serving, after-the-fact

1 recollections of what occurred. *See, e.g., McCoy v Southwest Airlines Company, Inc.*, 208 F.R.D.  
2 617, 620 (C.D.Cal. 2002)("[T]he tape may be used to impeach the pilots ... whose recollection of the  
3 events may be self-serving"). A complete CVR recording provides the only objective,  
4 contemporaneous account of what the flight crew saw and did in the moments leading up to the  
5 event and as it was taking place. This information is critical to United's reconstruction and  
6 understanding of how the accident occurred and, likewise, would be essential to a jury's  
7 understanding of the case in the event this matter goes to trial

8 ANA also argues that United's request should be denied because there is no United CVR  
9 recording and it would be unfair for United to have ANA's CVR recording when it will not be able  
10 to get this evidence from United. ANA is correct that United does not have a CVR recording of the  
11 incident. However, there is nothing in the Federal Rules of Civil Procedure that allows a party to  
12 withhold discoverable information based solely upon a perceived disparity in what is available to it.  
13 Furthermore, the fact that ANA will not have a copy of United's CVR recording does not put ANA  
14 at a disadvantage because the parties are not similarly situated. At the time of the collision, ANA's  
15 plane was under power and taxiing under the control of the flight crew. They were responsible for  
16 the movement of the plane and for ensuring that it could taxi safely to the runway. Conversely,  
17 United's airplane was not yet under power, was stopped for nearly 30 seconds and was still attached  
18 to a tug when the collision occurred. Unlike United's flight crew, ANA's flight crew played a  
19 critical role in this incident. Under the circumstances, the ANA CVR recording is a vastly more  
20 important piece of evidence. Simply put, the fact that ANA will not have United's CVR recording  
21 will not prejudice ANA.

22 United has met the statutory standard for discovery of ANA's CVR recording. This  
23 document is undoubtedly relevant, and United's ability to obtain a fair trial will be compromised if  
24 this information is withheld. At a minimum, a copy of the CVR recording should be submitted for  
25 *in camera* review to permit the Court to determine whether it should be produced.<sup>5</sup>

26  
27 <sup>5</sup> The CVR recording may require interpretation, as it is possible that the ANA pilots were  
28 speaking in Japanese. United's interpreter can be made available to the Court if necessary.

**G. Additional Time to Depose Pilots**

ANA's opposition papers do nothing to refute United's assertions that the depositions of the ANA pilots were seriously impeded by the English-Japanese interpretation, the evasiveness of the pilots, counsel's disruptive and leading objections, and ANA's failure to produce documents. The necessity for full English-Japanese interpretation itself provides grounds for continuing the depositions of the pilots. *See* 2000 Advisory Committee Notes to Fed. R. Civ. P. 30(d) ("Parties considering extending the time for a deposition — and courts asked to order an extension — might consider a variety of factors. For example, if the witness needs an interpreter, that may prolong the examination..."). As the DVDs submitted by United show, the depositions moved very slowly due to the full interpretation. The interpreter did not perform simultaneous interpretation. Rather, each question and answer was read twice — once in English and once in Japanese. This drastically reduced the time available to counsel, and, again, these difficulties were compounded by the pilots' evasion, counsel's interruptions and the fact that documents were not produced.

Further, there is no question that ANA's attorney unilaterally terminated the deposition of Mr. Yamaguchi after only six and one-half hours of testimony, well short of the seven hours allowed under Fed. R. Civ. P. 30(d)(1). United's attorney indicated that he had additional questions, but ANA terminated the deposition anyway for no reason. (See Doc. No. 45-9, pp. 135-38). United is entitled to finish deposing Mr. Yamaguchi. ANA also makes much of the fact that the depositions of Mr. Usui and Mr. Nishiguchi did not last for the full seven hours allowed under the rule. However, if the witnesses had provided responsive answers rather than evasive ones and if ANA had produced documents United requested, United undoubtedly would have used all of the allotted time. Considering the obstacles United faced, it was pointless to continue the depositions, each of which took up one full day. The fact that there was less than seven hours of on-the-record time has no bearing on United's request for leave to continue the depositions of Mr. Usui and Mr. Nishiguchi.

For these reasons, as more fully discussed in United's Memorandum of Points and Authorities, United should be permitted to continue the depositions of ANA's flight crew.



1 **III. CONCLUSION**

2 For the reasons stated above and in United's Memorandum of Points and Authorities, United  
3 respectfully requests that the Court **GRANT** this motion and enter an order (1) compelling ANA to  
4 produce documents responsive to United's First Request to Produce and Notice and Amended  
5 Notices of Taking Video Depositions, (2) granting United leave to continue the depositions of ANA  
6 pilots Yusuke Nishiguchi, Eishin Yamaguchi and Teruo Usui, and (3) awarding United the costs and  
7 fees it incurred in bringing this motion.

8  
9  
10 s/Scott R. Torpey

11 Jaffe, Raitt, Heuer & Weiss  
12 27777 Franklin Road, Suite 2500  
13 Southfield, Michigan 48034-8214  
14 Phone: (248) 351-3000  
15 E-mail: storpey@jaffelaw.com  
16 SB#153763  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

Scott R Torpey (Cal SB#153763)  
Jaffe Raitt Heuer & Weiss, P.C  
27777 Franklin Road, Suite 2500  
Southfield, Michigan 48034-8214  
Telephone: (248) 351-3000  
Facsimile: (248) 351-3802  
Email: storpey@jaffelaw.com

-and-

Jeffrey A Worthe (Cal. SB# 080856)  
Worthe, Hanson & Worthe  
1851 E First St., Ste. 900  
Santa Ana, California 92705  
Telephone: (714) 285-9600  
Facsimile: (714) 285-9700  
Email: jworthe@whwlawcorp.com  
Attorneys for Defendant United Air Lines, Inc.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA**

ALL NIPPON AIRWAYS COMPANY, )  
LTD. )  
 )  
Plaintiff, )  
vs. )  
UNITED AIR LINES, INC , )  
 )  
Defendant. )  
\_\_\_\_\_ )

Case No. C07-03422 EDL  
Hon. Elizabeth D Laporte

**CERTIFICATE OF SERVICE**

I hereby certify that on January 16, 2008 I electronically filed the foregoing papers with the Clerk of the Court using the ECF system which will send notification of such filing to the following:

Jeffrey A Worthe  
Worthe, Hanson & Worthe  
1851 E. First St., Ste. 900  
Santa Ana, CA 92705

Marshall S. Turner  
Condon & Forsythe LLP  
7 times Square  
New York, NY 10036

Frank A. Silane  
Roderick D. Margo  
Scott d Cunningham  
Condon & Forsyth LLP  
1901 Avenue of the Stars, Suite 850  
Los Angeles, CA 90067-6010

Dated: January 16, 2008

s/Scott R. Torpey  
Jaffe, Raitt, Heuer & Weiss  
27777 Franklin Road, Suite 2500  
Southfield, Michigan 48034-8214  
Phone: (248) 351-3000  
E-mail: storpey@jaffelaw.com  
Bar No: (P36179)